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A NATIONAL PROGRAM TO DEVELOP PROBATION AND PAROLE¹

JOSEPH N. ULMAN²

Legal biographers still debate whether Mr. Justice Holmes was a great liberal or a greater conservative; but all are agreed upon his greatness. He had an influence upon the lives and thoughts of his professional brethren, moreover, that is seldom mentioned. I refer, of course, to his habit of reading detective stories. Ever since this foible of the great man became known, our leading lawyers everywhere let it be whispered of them that they seek like relaxation from their burdensome cares. As for judges, every judge who indulges the fantasy that some day a quirk of fate will reward his exceptional merits with a seat on the Supreme Court—and which of us has not secretly dreamed this dream?—admits shyly that while he prefers biography, or economics, or a bit of Greek philosophy, nevertheless he *does* like a good detective story.

Now I rise to voice a personal disclaimer. Whatever the effect upon my career, regardless of your judgment upon me, heedless of your disfavor, quite recklessly, I announce that I do *not* read detective stories. I don't read them because I don't like them—and if this be treason, make the most of it!

So now, having made my confession I think I'll *tell* you a detective story. It is a true story and it has a moral. Everything about it is true except the names of the prisoners. A Victorian delicacy leads me to disguise these; a proper pride might cause me to suppress my own connection with it—for certainly I am not the hero of the tale. Let me first set the stage.

TIME: the present. PLACE: the Criminal Court of Baltimore—but it might be the criminal court of almost any other American city. DRAMATIS PERSONAE: *William Lewis* and *Harry Fulton*, the prisoners at the bar; *Philip Coulson*, the prosecuting attorney, a personable young man who does his duty firmly yet kindly; a *Grocer*, who was discreet in the face of danger; an observant *Filling Station Attendant*;

¹ Address before the Meeting of the National Probation Association, Seattle, Washington, June 24, 1938.

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Myself, the Presiding Judge, the Embodiment of the Law, which is everything that's excellent; Policemen, Detectives, Court Attendants, and a Long Black Revolver. Also several Cartridges loaded with dum-dum bullets.

The trial, both dignified and expeditious, followed close upon the heels of good policing. Therefore there was no opportunity for effective maneuvering by way of defense; the defendants had been caught red-handed, and wisely entered pleas of Guilty. The charges included burglary, larceny of an automobile, and robbery with deadly weapon. The desperate criminals thus accused were two boys, each eighteen years old. William Lewis looked and acted older than his years. He swaggered when he walked to the witness stand, told his story with an air of braggadocio, took his medicine without the flicker of an eyelid. Harry Fulton was more subdued, paler, thinner, a weakling compared with his pal.

The defendants having been arraigned, and their pleas taken, Philip Coulson made his statement as prosecuting attorney. At 10:45 p.m. on the evening of March 19 a call to headquarters reported the theft of an old Buick sedan, license number 42366. This was flashed at once over the radio to the police patrol cars equipped to receive such messages. Two hours later a keen-eyed police sergeant saw the stolen automobile parked near a filling station about five miles from where it had been taken. The car was empty. The sergeant and his assisting officer went into the filling station for information.

The filling station attendant proved to be a very intelligent young man. He had noticed the car when it drove up because he expected to make a sale. But the two boys drove a few feet beyond the pumps, parked the car, got out, and came into the station with no apparent purpose. The attendant watched them closely "just because them seemed so aimless." After a few moments he had to turn to wait on a customer. When he looked again, the boys had left. He had no notion why they had come into his place; but the car was still there.

So the police officers went into hiding where they could keep their eyes on both the stolen car and the inside of the filling station.

After about half an hour two youngsters walked slowly down the street and into the station. The attendant gave the officers a pre-arranged signal and conspicuously turned his back on his visitors. The sergeant then saw Lewis stoop over a trash-can in a corner of the station, pick something out of it, and walk quickly to

the stolen car. As he stepped into it a service revolver was held close to his side and he was told to halt. It was as well that the sergeant took this precaution, for Lewis turned quickly and attempted to draw a 38 from his inside coat pocket. But he realized that he was covered and submitted quietly to arrest.

Meanwhile Fulton had walked to the other side of the filling station where he too stooped and took something out of a waste basket. The other policeman arrested him as he walked out the door.

Taken to the police station and searched, each young bandit was found to have just \$15.20 in a neatly wrapped package. These packages turned out to be the articles taken from the trash can and the waste basket in the filling station. Lewis' gun was a 38 caliber Colt's revolver, fully loaded. The bullets were snub-nosed dum-dums, freshly filed into that deadly shape.

The police got the boys to talk without any trouble, and they repeated their stories on the witness stand with equal freedom. They had met for the first time about two months before in the City Jail. Fulton was there serving a sixty day term for larceny of an automobile; Lewis was finishing a somewhat longer term, six months for burglary. They were released at about the same time.

Lewis' first concern after his release was to procure a weapon. He did so by breaking into a hardware store at night. The 38 Colt was his reward. This crime was not traced to him until after his present arrest, when he rather boastfully told of it. The cartridges he had purchased. He said he didn't know just why he filed off the noses of the bullets, but he "supposed it would improve them."

Neither was able to get a job after their release from jail. Both had homes, with food and clothing enough; but spending money was not plentiful. On the evening of March 19 they were walking down the street together when they saw the Buick at a curb with a bunch of keys hanging from the ignition switch. They got in and drove away. At first they had no definite plan; but after a little while they decided to drive to Lewis' house where he picked up his gun and a half-pint bottle of whiskey.

The place they decided to stick up was a corner grocery near Lewis' home. Therefore, when they entered it, Lewis tied a handkerchief round his face as a mask, because he knew the grocer would recognize him. As a matter of fact the grocer, who testified

briefly after Mr. Coulson had finished his statement, said he was so scared when he found himself looking into the muzzle of the 38 that he recognized neither Lewis nor the unmasked Fulton who emptied the cash-register. "Something must of told me them bullets was dum-dums," he said; and the bailiffs called "Silence!" as nervous laughter ran through the court room.

The grocer's cash register yielded just \$35.40. This the young bandits divided into three parts, two of \$15.20 each, the third of \$5.00 for immediate use. They drove to the filling station on the outskirts of the city, where they selected the trash-can and wastebasket as temporary safe-deposit boxes for their two larger packages of money; then, with commendable frugality, they went to a nearby saloon and dance-hall to spend \$5.00 on a preliminary party. From there they planned to drive out of town, trade the old Buick for the first available newer and speedier car, and keep moving. They regarded the gun and the dum-dum bullets as so much working capital and felt sure they had a long and successful career ahead of them.

That's about all there was to the trial. The defendants were not first offenders; both had been on probation from the juvenile court before they were sixteen; both had served short terms in jail after passing that mystical age. We have a psychiatrist attached to our court, and I might have ordered a psychiatric examination. But this had been done in the juvenile court and both defendants were reported as somewhat retarded mentally but quite sane by all legal tests. We have, too, a probation department with a small staff of competent officers each carrying a case-load so heavy that anything like intensive probationary supervision is out of the question. So I had to impose sentence.

Lewis, who stole the revolver, was guilty of three crimes; Fulton of but two. Moreover, Lewis was undoubtedly the prime mover in the whole enterprise. Therefore he should receive the severer sentence. But what should the sentence be—and what might be expected to result from it? There they stood before the bar of justice; in years, in maturity, in judgment, merely two children. But they had proved themselves two very dangerous children. The grocer testified he heard a click when the revolver was pointed at him. "Sure, I meant to let him have it if he made any trouble!," Lewis answered when asked if he had cocked the gun.

Society has to be protected against children of this kind as against mad dogs.

So Lewis was sentenced to seven years in the Penitentiary, Fulton to six years in the House of Correction. And the Embodiment of the Law which is everything that's excellent, hangs his head in shame.

For I know that these children will come out of their prisons, when the appointed time rolls around, seasoned criminals in the prime of vigorous young physical manhood. They will come out after years of close daily association with old-timers. They will come out after years of semi-idleness spent in earnest endeavor to perfect themselves in the techniques of the underworld. They will come out; they will commit new crimes; they will go back again. Unless perhaps next time Lewis' victim "makes trouble"—then a widow with her fatherless children will await the hollow comfort of the news that Lewis had been hanged.

Protection of society? Is that the purpose of the criminal law? It ought to be. Nobody will dispute that.

What have I done to protect society? For a few years I have placed two bad boys, two social misfits, two dangerous young bandits, where they can do no harm. That is all I could do with the tools society has given me to work with. But I have done what I did with my eyes wide open to the tragic futility of it. I have done my sorry best, with the full knowledge that I did a rotten job. It wouldn't be so bad to preside in the criminal court if the judge were as blind as Justice.

So that's the way we do things in Maryland. Just why I should have come all the way out to Seattle to tell you about it puzzles me. Certainly you can do no worse. In fact, here in the west you have demonstrated a wisdom and a fearless freedom from the bonds of tradition that make us of the East rub our eyes in amazement. Eastern judges would feel that their sacred prerogatives were ruthlessly invaded if they lost control over length of sentence as is the case in California, Washington, and most notably in Utah. Many of us have never even heard of your laws that require judges to impose the maximum term provided for the offense and leave to a Board of Prison Terms and Paroles the subsequent determination of the actual term of imprisonment. It would be impossible in a short address for me to discuss with you the relative advantages and nice distinctions among the several plans you have developed.

But I must take time to congratulate all of you upon the progress you have made and to say that it impresses me even more favorably than your climate and your scenery. Perhaps there is a subtle connection between the pure air of your high mountains and your advanced social thinking.

My own familiarity with the things you are trying to do comes to me, of course, not in my capacity as a Baltimore judge but because of the opportunities I have enjoyed as a member of the board of Prison Industries Reorganization Administration. Appointed by President Roosevelt to work in cooperation with the several states in their efforts to deal with the shocking evils of idleness in prison, we took the stand from the very beginning that no effective results could be hoped for unless each state penal system was studied and developed as a whole. Work programs and educational programs worth while cannot be developed in over-crowded institutions. Classification of inmates according to their individual needs and potentialities is impossible without various types of institutions for the many different kinds of persons confined within them. And everywhere we have found that there has been too much reliance upon stone walls and iron bars as the principal measures for the protection of society. Everywhere we have found men behind the bars, hundreds of them in some states, against whom society could protect itself equally as well by supervision under probation or on parole. In every institution, also, we have found men about to be released because of expiration of sentence who are practically certain to commit new crimes and return once more to prison.

Quite obviously, we need to attack crime more intelligently. I do not fear the sneers of those who try to make the public believe that probation and parole are twin daughters of darkness. I stand firmly upon the rock that each person convicted of crime is an individual human being who must be studied as an individual and treated as an individual. If he has in him the capabilities that go to the making of a useful and law-abiding citizen then a society that fails to develop those capabilities and is content merely to punish him is as foolish as it is without mercy. But if he is a hard-boiled criminal, if he is a social menace today and likely to be a social menace tomorrow, then society must think in terms only of its own protection. Permanent segregation, even elimination by death, are the only appropriate treatment for some offenders. But let this be determined in respect of each individual by a cool and

dispassionate study made by trained persons, not by emotional outburst or subtly stimulated popular outcry.

This personal evaluation of the individual offender must begin when he is tried for his crime and must be continued systematically in every succeeding stage of his treatment. You in the west have done well to provide by statute that release on probation may never be ordered until probation officers have made a thorough case study and submitted a written report to the sentencing judge. Mere court-room impressions are no safe guide. I know because I have been fooled by them so often. So, too, release on parole should rest upon the even better data available when the social case history of the prisoner before his incarceration is supplemented by the information that trained psychologists and intelligent prison officials can supply concerning his activities during imprisonment.

Flatly, then, I urge the greater use of probation. And I restate the obvious when I say that no prisoner should ever be released except on parole. At the same time, I insist upon the sternest measures and long terms for the professional criminal, the gangster, and the public enemy, whatever his number. I insist further, that there is no inconsistency in these aims. On the contrary, they all proceed from an identical base—that each offender is an individual and that the effective protection of society requires his treatment as an individual. For this we may need new types of institutions. We certainly do need to think and plan more intelligently than has been our habit.

Probably the most impressive need of all is to improve our administration of both probation and parole. I have some sympathy with those who condemn these important devices of modern penology. Some of them go too far and it is hard to forgive them for building up an unthinking public resentment against what are at once the most humane and the most intelligently constructive measures for controlling crime and reclaiming criminals. But the fault is largely our own. Too often we are content with half-way measures. Is there a man in this room to challenge the assertion that most probation departments, most parole departments, are shockingly undermanned? Does anybody really believe that this most difficult kind of social case-work can be done properly by an officer required to supervise two hundred or more cases? Does anybody really believe that probationers or parolees who are visited once in six months, or are not visited at all and report by mail—does

anybody really believe that these men are under helpful and controlling supervision?

Yet most of us are willing to put up with these conditions on the theory that half a loaf is better than no bread. I am not so sure about that. Sometimes I think it might be better to go to our legislatures and say frankly that probation and parole can be made valuable agencies of social control if they are supported adequately, but that they are a menacing source of danger to society if the states keep them on starvation rations. No officer, however well trained, however intelligent, however industrious, can do a decent job if he has to supervise more than fifty probationers. Those who hold the purse strings must be made to know this elementary fact. Until they are ready to act on it, perhaps it might be better to shut up shop.

The crime story with which I began my talk is, of course, one of many, all differing in detail, all alike in their essential social folly. Every day, in every part of this enlightened land, the obsolescent machinery of criminal justice creaks and groans as it takes young men into its maw, crushes every vestige of decent manhood out of them, and throws them back to fester in society. An unusually effective presentation of what is happening is contained in a recent book to which I want to refer at some length, *YOUTH IN THE TOILS*, by Leonard V. Harrison and Pryor McNeill Grant. This is no piece of sensational muck-raking, but a calm, objective study by scientists. Its great strength lies in its admirable restraint.

The authors base their interesting and provocative conclusions upon an intensive study of the cases of several hundred young persons arrested, tried, and imprisoned in the City of New York. The story of social ineptitude begins when these delinquents are examined at detective headquarters and follows through as they wait in the Tombs for the day of trial. Between arrest and trial the boy unable to give bail is subjected to treatment calculated as by design to make him a real criminal. And then he is tried before busy judges whose crowded dockets force them to apply a mechanized and legalistic procedure that takes little account of the problem of human maladjustment presented by each case. Finally, if a prison term is imposed the young criminal goes to a reformatory or a prison in which the mass incarceration of hundreds or even thousands of inmates makes almost impossible any effective work

of rehabilitation. When at last he is released on parole, he has come to think that the world is his enemy and that crime is his only trade. He resents the supervision of his parole officer and refuses to believe that anybody wants to help him go straight.

So much of *YOUTH IN THE TOILS* as describes the workings and the disastrous effects of our present system is a story all too familiar to students of criminology. It is the story of our greatest and most costly social failure. The authors have given it fresh dramatic values by including in their text a great number of significant case-histories; and the fact that their study is confined to the cases of persons under twenty-one years of age, still in the relatively pliant and formative period of life, makes the tragedy of these cases particularly poignant.

Many others have used similar material, few with such telling effect. The special value of the present book is in the planned remedy, or rather the planned set of remedies, the authors have worked out. There is nothing novel about their proposals unless it is that they are presented as parts of a planned and integrated whole. The authors remember always that the young person who is arrested and detained before trial in a physically and morally filthy jail, is the same young person, the same human being, throughout every stage of what follows. In this insistence upon the human *nexus* that binds together the whole process of enforcement of the criminal law lies the peculiar value of this study.

The system proposed is revolutionary only because it is rational and logical. In brief, it is that from the moment of arrest the young offender shall be studied and treated as an individual. His trial is to be conducted as informally as possible, with full regard for the preservation of his legal and constitutional rights. It is urged strongly and most persuasively that the trial court shall be organized with its fact finding division separate and distinct from its sentencing part. A judge trained conventionally in the law, with the aid of a jury if necessary, shall decide the question of guilt or innocence. Then the prisoner shall be turned over for sentence and further treatment to a Disposition Board, composed of scientifically trained persons rather than of mere lawyers. This proposal might have seemed radical a few years ago, but today it is almost a commonplace.

However, and this is by far the most important point in the program, they have elaborated this feature of their plan to include

a proposal that the Disposition Board shall retain jurisdiction over the offender after sentence and during the whole period of his treatment and social control. In this they recognize what all present and traditional systems ignore (even that of Utah, in part): that the flow of life is a continuous process and that if society is to deal efficaciously with law-breakers we must find ways to assure a continuous treatment of them. Until now we have acted as though the lives of criminals can be divided up into a series of unconnected episodes. We have caused each episode to stand off by itself, and have designated separate sets of public officials to deal with each separate episode. We have required judges to sentence offenders to institutions they know nothing about, institutions over which they have no control. Once in the institution the prisoner has been made subject to rigid disciplines taking little or no account of the development of his personality; and upon his release he has been turned over to still another set of officials, the parole officers, to whom he presents a novel human problem largely disconnected with his life up to that time.

The authors would substitute for this episodic method a unified and continuous treatment all under the direction of the Disposition Board. This arm of the court is to be implemented with adequate staffs of probation and parole officers and is to have under its direct control a graduated series of facilities and institutions ranging through supervised homes, small hostels, special training schools, work camps, penal colonies and prisons. The Board is to have power to subject delinquents to treatment in such of these facilities as may from time to time prove desirable and to release them either conditionally on parole or unconditionally into freedom when they have demonstrated their fitness to be released. The psychologist and the educator will take the place of the typical prison guard as inspirational leader and moral guide; emphasis throughout will be on the rehabilitation of those susceptible of reform. On the other hand, the residue, about 20%, incapable of response to this kind of treatment will be isolated from society for a much longer period than under our present haphazard sentencing practices; and the sorry spectacle of repeated cycles of crime, arrest, imprisonment and release will become less and less common as the new system perfects its techniques.

I like to tease myself by imagining the probable effects of such a system upon the daily grist in my own court. William Lewis and Harry Fulton, in all likelihood, would not have visited me at all last

March, and would not now be taking post-graduate courses in our Maryland prisons. Each of these youngsters had committed previous offenses. The records in the Juvenile Court disclosed enough about their backgrounds, their homes, and their personalities to make it quite clear that the short terms in jail imposed upon them a few months before their latest exploit were worse than futile gestures. They were released when obviously unfit to move about in free society; anybody could have predicted that they would commit new crimes. Recidivism is a price we pay for our unscientific criminological practices. And recidivism, especially in the case of the youthful offender, often means a steady progression from less serious to more serious crime as we stupidly drive the unhappy culprit deeper into his anti-social ways of living.

YOUTH IN THE TOILS charts a new and better course. I have only one fault to find with it. Its proposals are confined to the treatment of delinquent minors beyond the jurisdictional age of the juvenile court. True, these present at once the most serious problem and the most hopeful material that reach our criminal courts. If we can learn to deal with them successfully we shall go far to diminish crime; if we continue to fail with them we may as well throw up our hands in despair. Harrison and Grant have written a book that forbids despair, a book that grips the imagination of the reader and inspires him to action. The American Law Institute has initiated already a preliminary study to determine the possibilities of the wise and far-reaching legislation that it suggests; and I account it a great distinction that I have been privileged to work with Mr. Harrison and others in making this study. But there is no sound reason to limit the application of this thoroughly rational program to offenders within a limited age group. It presents a plan that applies equally as well to every violator of the law, young or old—a plan of criminal justice, to take the place of the chaotic injustice that so generally prevails.

Now finally, I wonder if anybody here remembers the subject of my present speech. It is "A National Program to Develop Probation and Parole"; and though you may not have guessed the fact, I have had it in mind all the time. For I believe very earnestly that a sound program to develop probation and parole must be an integral part of a far-reaching program to reform our whole method of dealing with lawbreakers. You in the west have sensed that fundamental fact and made striking contributions to current legislation and practice. We of the east are more apt to go slowly.

Tradition binds us more tightly than it does you—often we seem to be afraid to move at all. But when all is said and done, Leonard Harrison and his co-worker the late Pryor McNeill Grant are products of the effete east; so we are not quite sterile. They have sounded a progressive note that I am proud to echo. They have pointed the way toward a new system of criminal justice in which probation and parole will be used more liberally than ever before. But they insist and I insist that the administration of probation and parole must be put on the highest possible plane of good social case-work. And I insist too that probation and parole are but parts, essential though they may be, of a planned system of penology. Standing by themselves, they may be dangerous. Integrated with a rationally planned system of criminal justice, recognized as essential features of such a system, utilized intelligently, and supported adequately, both probation and parole will take on a new dignity and importance. No one will then dare to refer to these methods of treatment as the folly of theorists or the weakness of sentimentalists. On the contrary, everyone will acclaim them as valuable aids in the protection of society and as convincing proof that we are learning to cope with crime constructively.